Supreme Court, U. S.
FILED
JUN 4 1980
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1637

J. P. STEVENS & CO., INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MEMORANDUM FOR THE RESPONDENT UNION IN OPPOSITION

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We adopt the Question Presented and the Statement at pp. 2-4 of the Brief for the National Labor Relations Board in Opposition.

ARGUMENT

The petition challenges those portions of the Board's Order, approved by the Court of Appeals, which grant the union access to the company's property for the purpose of communicating with employees, and the use of plant bulletin boards for the same purpose. That Order, entered in response to exceptions filed by the union as the charging party, was based on "Respondent's long history of violations of employee rights and its flagrant disregard of Board decisions and court orders, and * * * the reasons set forth in *J. P. Stevens & Co., Inc.* [239 NLRB No. 95]". (Pet. A3)[1] Although petitioner employs the soft euphemism "litigation history" (Pet. 7) to characterize its past misconduct, the Court of Appeals for the Second Circuit has observed that that history "has earned the Company its reputation as 'the most notorious recidivist' in the field of labor law." *NLRB* v. *J. P. Stevens & Co., Inc.*, 563 F.2d 8, 13, *cert. denied*, 434 U.S. 1064 (*Stevens XVIII*).[2]

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[1] "Pet." refers to the Petition for a Writ of Certiorari herein. Petitioner J. P. Stevens & Co., Inc. will sometimes be referred to herein as "Stevens".

[2] Stevens' assertion that subsequent to the entering of the contempt order in *Stevens XVIII*, *"the Board has made no claim that the employer has violated any commitments under court orders* (Pet. 8, emphasis in original) is accurate only if read as asserting that the Board has not filed any subsequent contempt proceedings, for the Company continues to violate the Act, and the General Counsel has continued to file unfair labor practice complaints against it. The further assertion that the remedies herein "must be based upon the record in *this proceeding* and the compliance posture of the petitioner at the time of *this Board order* (*id.*, emphasis in original) is unsupported by any citation of authority and is plainly contrary to law. For example, as the Fifth Circuit said in another case arising out of Georgia, the Board may

The Board's order herein is based directly on the Second Circuit order in *Stevens XVIII*. (See *J. P. Stevens, etc.* 239 N.L.R.B. No. 95, *supra*, Board D&O p. 3, n. 5, approving in pertinent part A.L.J. Dec. p. 81, but eliminating a geographical limitation contained therein). In *Stevens XVIII* the Court ruled:

> The Master did not recommend any remedies designed to give the union access to Company employees. Several such remedies were, however, provided in *Stevens XIII*, and we believe that they are once again appropriate and necessary to "dissipate the fear in the atmosphere within the Company's plants generated by its anti-union campaign." *Stevens II*, *supra*, 388 F.2d at 906. As in *Stevens XIII*, we order that the union be allowed to post notices on plant bulletin boards, 81 L.R.R.M. at 2286-87 ¶ 9; * * *
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> * * *
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> On the other hand, we [approve the Board] * * * proposal that the union be allowed access to certain non-work areas of Stevens's Carolina plants. It is apparent from this contempt adjudication that the in-plant organizing activities of Stevens's employees have been frustrated and discriminated against by the Company's policies. We recognize that [t]he policies of the [National Labor Relations] Act," in the context of a union organizing campaign, do not necessarily call for increased union access to the employees, but "call instead for a change in the plant's atmosphere." *Id.* But in this case, we believe that the two goals are complementary. Rea-

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consider the "atmosphere of persistent, long continued, flagrant violations [by the Company] occurring after and in spite of repeated declarations of illegality by Board and reviewing Courts." *J.P. Stevens & Co., Inc.* v. *N.L.R.B.*, 417 F.2d 533, 537 (*Stevens V*). The Company's "opposition leading to illegal excesses was not localized to the Georgia plants. Employees, too, may get the word. And that word was the story revealed by [earlier *Stevens* cases.] The warning was there for all to heed." *Id.* at 540.

> sonable solicitations for the union should be permitted without the employees' fear that they will be reprimanded or placed under surveillance by their supervisors. Giving the union access to some non-work areas of the plants will help to reduce this atmosphere of fear, and is therefore, an appropriate remedy to order in this case. [563 F.2d at 24-25, footnotes omitted.]

Stevens' petition for certiorari to review the order in *Stevens XVIII* was denied, 434 U.S. 1064. In that petition, as here (Pet. 10-16), Stevens objected particularly to the access provisions of the court's order, asserting that they were inconsistent with *Labor Board* v. *Babcock & Wilcox*, 351 U.S. 105. See Petition for Certiorari No. 77-726, p. 2 (Question 1); pp. 6-10. The argument that an access order was improper was also made in the unsuccessful Petition for Certiorari in *Stevens XIII* (*J. P. Stevens & Co.* v. *National Labor Relations Board*, 410 U.S. 926, denying certiorari to review 464 F.2d 1326).[3]

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[3] Stevens there argued:

> The 1967 and 1968 decrees of the court of appeals, which underlie this case, ordered the Petitioners to cease and desist from actions which were held to interfere with or restrain or coerce employees "in the exercise of their right to self-organization" * * *. It is to be noted that the decrees were designed to prevent unlawful interferences with the rights of employees, and that they were not intended to promote Union activities or the interests of any Union. Yet paragraphs 9, 10, 11 and 12 of the court's order confer direct benefits upon the Textile Workers Union of America, AFL-CIO, which are not only in conflict with the provisions of 29 U.S.C. § 158(a)(1), but which are neither necessary nor appropriate to the purpose of assuring that the Petitioners shall cease and desist from interfering with the rights of employees.

[Footnote continued on page 5]

Stevens' petition herein offers no argument of substance which would call for a different result than the denials of certiorari in *Stevens XIII and Stevens XVIII.*[4] It does assert that the Board's order interferes with its "property rights". (Pet. pp. 2, 10-16.) If this is intended as an argument of substance rather than a mere rhetorical flourish to underscore its *Babcock* argument, Stevens' assertion comes too late. For, before the Board, and the Court of Appeals, Stevens argued only that under *Babcock* the union was not entitled to access because other avenues of communication to the employees were available. It was not until Stevens' second motion for

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[3] [Continued]

As has been emphasized, in a civil contempt case orders are to be entered only for the purpose of producing compliance with the terms of the original and underlying decrees. In the underlying decrees in the case, there were no such provisions as, for example, requirements for the gathering of employees in the plants, on Company time, in order that Union representatives might come into the plants and make speeches to the employees, nor any requirements that the Company must furnish to the Union the names and home addresses of its employees. Therefore, the Court's placing of such requirements in the order now under consideration was affirmative punitive action, not action to assure that the Petitioners would cease and desist from interfering with the rights of employees. [Pet. for Cert. No. 72-740, pp. 18-19.]

[4] While Petitioner would distinguish *Stevens XVIII* on the ground that it was a contempt proceeding (Pet. 8), *civil* contempt orders must be remedial, rather than punitive, and therefore cannot be meaningfully distinguished from orders under § 10(c) of the NLRA. Petitioner's further point, that the order in *Stevens XIII* was limited to its plants in North and South Carolina does not raise an issue of the Board's *power;* rather it presents only a narrow difference of degree, which does not warrant this Court's attention.

stay in the Court of Appeals that it claimed that the order impermissibly deprived it of property. Under these circumstances that issue is not entitled to this Court's consideration. See e.g., *Adickes* v. *S. H. Kress and Company*, 398 U.S. 144, 147, n. 2. See also *U.S.* v. *Mitchell*, 48 L.W. 4365, 4368, n. 7 (April 15, 1980).

Even if it had been timely raised, petitioner's "property rights" argument would lack sufficient substance to warrant review. This Court has never held, either on statutory or constitutional grounds, that the Board lacks all power to require an employer to permit non-employee union organizers to enter onto its property in order to communicate with the employees regarding the employees' organizational rights. Rather, this Court's decisions, beginning with *Babcock*, 351 U.S. 105, 111-112, have established a standard whereby the Board is required to *balance* the employees' statutory rights and the employer's property rights.

And while Stevens argues that the balance should be struck in its favor, its reliance on *Babcock* and the other Labor Board cases cited at Pet. 10, n. 8 is fundamentally fallacious. For, whereas in those cases the issue was whether the employer had unlawfully interfered with its employees' statutory rights by denying access (in violation of § 8(a)(1) of the NLRA), the issue here is whether the access requirement is an appropriate remedy (under § 10(c)) for the company's violations of employee rights. Stevens is not "entitled to stand before the law as one who has never violated the law at all." *International Salt Co.* v. *U.S.*, 332 U.S. 392, 400. See also *National Society of Professional Engineers* v. *U.S.*, 435 U.S. 679, 697; "While the resulting order may curtail the exercise of [First Amendment] liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation."

CONCLUSION

For the foregoing reasons and those stated in the Brief for the National Labor Relations Board in Opposition, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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